

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JEFFREY GARCIA,

Plaintiff,

vs.

CAROLYN W. COLVIN,  
Acting Commissioner of Social  
Security,

Defendant.

No. 1:15-CV-3089-LRS

**ORDER GRANTING  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT,  
*INTER ALIA***

**BEFORE THE COURT** are the Plaintiff's Motion For Summary Judgment (ECF No. 14) and the Defendant's Motion For Summary Judgment (ECF No. 18).

**JURISDICTION**

Jeffrey Garcia, Plaintiff, applied for Title XVI Supplemental Security Income benefits (SSI) on January 12, 2011. The application was denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on July 29, 2013 before Administrative Law Judge (ALJ) Virginia Robinson. Plaintiff testified at the hearing, as did Vocational Expert (VE) Kimberly Mullinax. On September 13, 2013, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision subject to judicial review. The Commissioner's final decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

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## STATEMENT OF FACTS

The facts have been presented in the administrative transcript, the ALJ's decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At the time of the administrative hearing, Plaintiff was 28 years old. He has no past relevant work experience. Plaintiff was 25 years old when he applied for SSI benefits on January 12, 2011.

## STANDARD OF REVIEW

"The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence...." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

It is the role of the trier of fact, not this court to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

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1 A decision supported by substantial evidence will still be set aside if the proper  
2 legal standards were not applied in weighing the evidence and making the decision.  
3 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.  
4 1987).

## 5 6 ISSUES

7 Plaintiff argues the ALJ erred in: 1) evaluating the medical opinions of record;  
8 and 2) discounting Plaintiff's credibility.

## 9 10 DISCUSSION

### 11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act defines "disability" as the "inability to engage in any  
13 substantial gainful activity by reason of any medically determinable physical or  
14 mental impairment which can be expected to result in death or which has lasted or can  
15 be expected to last for a continuous period of not less than twelve months." 42  
16 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined  
17 to be under a disability only if her impairments are of such severity that the claimant  
18 is not only unable to do her previous work but cannot, considering her age, education  
19 and work experiences, engage in any other substantial gainful work which exists in  
20 the national economy. *Id.*

21 The Commissioner has established a five-step sequential evaluation process for  
22 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,  
23 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if she is engaged  
24 in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §  
25 416.920(a)(4)(i). If she is not, the decision-maker proceeds to step two, which  
26 determines whether the claimant has a medically severe impairment or combination  
27 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe  
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1 impairment or combination of impairments, the disability claim is denied. If the  
2 impairment is severe, the evaluation proceeds to the third step, which compares the  
3 claimant's impairment with a number of listed impairments acknowledged by the  
4 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.  
5 § 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or  
6 equals one of the listed impairments, the claimant is conclusively presumed to be  
7 disabled. If the impairment is not one conclusively presumed to be disabling, the  
8 evaluation proceeds to the fourth step which determines whether the impairment  
9 prevents the claimant from performing work she has performed in the past. If the  
10 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §  
11 416.920(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step  
12 in the process determines whether she is able to perform other work in the national  
13 economy in view of her age, education and work experience. 20 C.F.R. §  
14 416.920(a)(4)(v).

15 The initial burden of proof rests upon the claimant to establish a prima facie  
16 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
17 Cir. 1971). The initial burden is met once a claimant establishes that a physical or  
18 mental impairment prevents her from engaging in her previous occupation. The  
19 burden then shifts to the Commissioner to show (1) that the claimant can perform  
20 other substantial gainful activity and (2) that a "significant number of jobs exist in the  
21 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
22 1498 (9th Cir. 1984).

## 23 24 **ALJ'S FINDINGS**

25 The ALJ found the following: 1) Plaintiff has "severe" medical impairments,  
26 those being seizure disorder, status post cerebral artery infarct/left sided hemiparesis,  
27 sleep apnea, obesity, low average cognitive ability/learning disorder, and depression;

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1 2) Plaintiff's impairments do not meet or equal any of the impairments listed in 20  
2 C.F.R. § 404 Subpart P, App. 1; 3) Plaintiff has the residual functional capacity  
3 (RFC) to perform less than the full range of light work as defined in 20 C.F.R. §  
4 416.967(a): he can lift and carry 25 pounds occasionally and 10 pounds frequently;  
5 stand or walk six hours and sit six hours in a workday; occasionally climb ramps and  
6 stairs; never climb ladders, ropes and scaffolds; occasionally balance; frequently  
7 stoop, kneel, crouch and crawl; has unlimited reaching and handling with the right,  
8 upper extremity, and with the left upper extremity can assist in lifting and handling,  
9 but only occasionally grip; cannot drive and must avoid exposure to workplace  
10 hazards such as dangerous machinery and unprotected heights; and has sufficient  
11 attention and concentration to perform relatively simple, non-complex tasks; and 4)  
12 Plaintiff's RFC allows him to perform other jobs existing in significant numbers in  
13 the national economy as identified by the VE, including counter clerk, election clerk,  
14 cafeteria attendant and counter attendant. Accordingly, the ALJ concluded the  
15 Plaintiff has not been disabled at any time since January 12, 2011.

## 16 17 **OPINIONS OF TREATING AND EXAMINING PHYSICIANS**

18 It is settled law in the Ninth Circuit that in a disability proceeding, the opinion  
19 of a licensed treating or examining physician or psychologist is given special weight  
20 because of his/her familiarity with the claimant and his/her condition. If the treating  
21 or examining physician's or psychologist's opinion is not contradicted, it can be  
22 rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725  
23 (9<sup>th</sup> Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). If contradicted, the  
24 ALJ may reject the opinion if specific, legitimate reasons that are supported by  
25 substantial evidence are given. *Id.* "[W]hen evaluating conflicting medical opinions,  
26 an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory,  
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1 and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427 F.3d 1211,  
2 1216 (9th Cir. 2005).

3 **1. Kyle Heisey, M.D.**

4 Plaintiff filed an application for SSI benefits on September 1, 2004. In a  
5 decision dated June 30, 2010, ALJ Marie Palachuk denied that application for  
6 benefits. (AR at pp. 78-97). Plaintiff did not appeal from this decision and instead  
7 filed a new application for SSI benefits. It is this application which is currently  
8 before this court. This court has reviewed ALJ Palachuk’s decision insofar as it  
9 concerns Plaintiff’s treatment by Dr. Heisey prior to June 2010.

10 Plaintiff has a previous period of disability as a child. This period of disability  
11 ended on May 1, 2004, when he attained the age of 18. (AR at p. 78). Plaintiff did  
12 not appeal the termination of benefits. (AR at p. 81). Dr. Heisey has been seeing the  
13 Plaintiff as a patient for many years, indeed as early as November 2004. In  
14 November 2005, Dr. Heisey noted he had not seen the Plaintiff in approximately one  
15 year. (AR at p. 83). According to ALJ Palachuk, in November 2005, “Dr. Heisey  
16 opined [Plaintiff] was unable to do work or a training program if he continued to have  
17 absence seizures and supported an application for medical coupons to get his seizure  
18 disorder under control when he could then pursue activities more successfully.” (AR  
19 at pp. 83-84).

20 Plaintiff apparently followed up with Dr. Heisey in August 2006. At that time:

21 He admitted not taking his medications and drinking on  
22 a regular basis, with his seizures being quite active during this  
23 time. He had now stopped drinking and had started Tegretol  
24 again. He was currently not working, but had sorted cherries  
25 over the summer. He denied symptoms of depression. He  
26 thought it was possible he had some absence type episodes.  
27 He was hoping to enroll in the community college, and Dr.  
28 Heisey reported it was unclear to him if he could function  
in a normal classroom without special accommodation.

(AR at p. 85).

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1 Dr. Heisey reported that Plaintiff had been admitted to the hospital in  
2 September 2006. A drug screen was positive for cocaine, amphetamines, barbiturate,  
3 and tricyclics. Plaintiff denied using drugs. Plaintiff had been working out and  
4 lifting weights and planned on going to college in January 2007. Dr. Heisey felt  
5 Plaintiff still had focal seizure and increased his medication, but it was also “likely  
6 [Plaintiff] had been using some illicit substances that contributed to his seizures,  
7 despite his denials.” (AR at p. 85).

8 Plaintiff saw Dr. Heisey in April 2007. Plaintiff “stated he was taking his  
9 medication appropriately, however, Dr. Heisey noted that in October [2006], he had  
10 had a level of 5.4 which was in the low portion of the therapeutic range.” (AR at p.  
11 85). Plaintiff apparently had been forced into drug treatment after a positive urine  
12 test in September 2006, although he denied using drugs. Dr. Heisey felt it was to the  
13 Plaintiff’s advantage to stay in the program and prove he was not taking drugs. Dr.  
14 Heisey increased Plaintiff’s medication once again. (AR at p. 85).

15 In November 2007, Dr. Heisey noted Plaintiff had not had any seizures since  
16 the increase in medications. Plaintiff had been helping his mother do some  
17 landscaping-type work over the summer and was applying for positions at retailers.  
18 Plaintiff stated that the drug treatment program he had been in found no evidence of  
19 drug use or addiction on his part. Plaintiff “seemed motivated to work and was  
20 getting some help from the Department of Vocational Rehabilitation.” Furthermore,  
21 “Dr. Heisey opined that [Plaintiff] was capable of medium exertion, although it was  
22 not safe for him to perform activities involving balancing and climbing due to  
23 potential for a seizure.” (AR at p. 86).

24 Plaintiff was evaluated by Dr. Heisey in March 2008. At that time, Dr. Heisey  
25 noted that Plaintiff had been taking his medications as prescribed and had not been  
26 using any alcohol or drugs, however “he described an episode the week before when  
27 he went stiff and then blacked out.” Dr. Heisey opined that Plaintiff was “severely  
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1 limited pending seizure control and sleep disorder control” and he increased the  
2 Plaintiff’s medication. (AR at p. 86).

3 In May 2008, Dr. Heisey noted he had received information from a pharmacy  
4 indicating Plaintiff was not buying his medication frequently enough to support the  
5 recommended dose. Dr. Heisey was not convinced Plaintiff was taking his  
6 medication routinely, notwithstanding Plaintiff’s assertion to the contrary. Plaintiff  
7 reported an episode three days earlier and also waking up on the floor one day last  
8 week, suggesting he had a seizure during the night. Dr. Heisey told him to increase  
9 his medications. (AR at p. 86).

10 In July 2008, Dr. Heisey opined that Plaintiff had “permanent disabilities of  
11 seizure disorder, learning disability, and obstructive sleep apnea, which severely  
12 limited his ability to work.” Dr. Heisey completed a Medical Source Statement  
13 indicating Plaintiff needed to lie down every day for about 30 minutes due to  
14 drowsiness from his medications. He also indicated Plaintiff had “fine motor  
15 problems with his left hand and subtle weakness in the left leg;” was able to stand  
16 and/or walk less than 1 hour in an 8-hour day; was able to sit less than 1 hour a day  
17 in and 8-hour workday; could lift and carry up to 50 pounds occasionally; could  
18 occasionally bend, squat, climb, or reach; and was unable to work around heights,  
19 machinery, or water. (AR at p. 86).

20 In September 2008, Plaintiff reported to Dr. Heisey that it had been two to  
21 three weeks since he had suffered a major seizure, but that he had been having some  
22 staring spells. Plaintiff admitted he forgot to take his medications at times and his last  
23 level in July has been lower than therapeutic levels. Dr. Heisey reported it was his  
24 understanding that Plaintiff “had significant learning disabilities, either associated  
25 with poor control of the seizures or as a secondary diagnosis.” According to Dr.  
26 Heisey, because “inadequate management of [Plaintiff’s] seizures had been a life-long  
27 issue, it was hard to estimate whether this would come under better control in the  
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1 future” and “[b]etter control of his seizures would allow him to pursue further  
2 education.” Plaintiff was “[c]learly . . . unable to drive and would not be a candidate  
3 to work around dangerous machinery or at heights or work that required climbing.”  
4 (AR at pp. 86-87).

5 In March 2009, Dr. Heisey saw the Plaintiff for a “public assistance benefits  
6 physical.” According to the doctor at that time:

7 [Plaintiff] stated he had been feeling well and not had a seizure  
8 since sometime in 2008. He had been physically active, with  
9 walking and basketball and had lost some weight. He was  
10 using his CPAP machine for sleep apnea. On exam, he was in  
11 no apparent distress. No tremor or movement disorder was  
noted. Tandem gait and Romberg exam<sup>1</sup> were within normal  
limits. Impression was seizure disorder, adequately controlled,  
learning disability, chronic, and obstructive sleep apnea, with  
CPAP working well.

12 (AR at p. 87).

13 In an August 2009 evaluation, Dr. Heisey reported that Plaintiff’s medication  
14 (Carbamazepine) level was good, although it had been low in March. Plaintiff  
15 admitted to stopping his medication around the time his grandmother died, which  
16 apparently was in March. (AR at p. 88).

17 Plaintiff saw Dr. Heisey again in November 2009. ALJ Palachuk summarized  
18 this report from Dr. Heisey as follows:

19 [Plaintiff] reported that for the last 2-3 weeks he could not  
20 remember anything. He also seemed to have lost memory for  
21 at least the last 10 years. He denied any trauma. His foster mother  
22 accompanied him and denied any trauma or seizures. It was  
23 unclear if he had been taking his seizure medicine prior to  
2-3 weeks ago, but since then, she stated she had been giving it  
24 to him as prescribed. He denied use of alcohol or other drugs,  
fevers, chills, or other systemic complaints. He stated he could  
25 not remember who Dr. Heisey was or having been to the clinic  
before, yet he did not seem at all distressed or frustrated. Dr.  
Heisey reported [Plaintiff] could be expected to have some memory  
loss if he was having frequent or constant seizures and was in a

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26 <sup>1</sup> This is a test to determine if an individual has balance problems and if so,  
27 the source of them.  
28

1 post ictal [sic] state, but this did not seem to be the case. His  
2 memory loss was felt to represent a dissociative event.

3 (AR at pp. 89-90).

4 In December 2009, Plaintiff reported to Dr. Heisey that his memory had  
5 gradually returned. Plaintiff felt he still had a tremendous amount of stress, but he  
6 did not seek treatment from Behavioral Health as recommended. His medication  
7 levels were normal as at his last visit, and his urine drug screening was negative. (Ar  
8 at p. 90).

9 In her decision, ALJ Palachuk noted that Plaintiff saw Dr. Heisey for a public  
10 assistance benefits evaluation in February 2010. Plaintiff reported that he tried to  
11 remember to take his medications, but sometimes missed taking them at night.  
12 Plaintiff indicated he had not had any seizures since later November 2009. His  
13 medication levels in December 2009 had been reasonable. Dr. Heisey's assessment  
14 was seizure disorder, obstructive sleep apnea and learning disability. The doctor  
15 opined that Plaintiff's disability was "permanent." (AR at p. 90).

16 This appears to be the same February 2010 evaluation referred to by ALJ  
17 Robinson in her decision. (AR at pp. 25-26). In that evaluation, Dr. Heisey wrote:  
18 "[Plaintiff's] seizures are controlled when he takes medication, but he is unable to  
19 remember to take the meds 100% of the time." (AR at p. 324). Dr. Heisey indicated  
20 that Plaintiff's seizure disorder had a severity rating of "5," that being an inability to  
21 perform one or more basic work-related activities, specifically hearing,  
22 communicating and understanding or following directions. Dr. Heisey rated  
23 Plaintiff's learning disability as a "4," that being a very significant interference with  
24 the ability to perform one or more basic work-related activities, specifically  
25 communicating and understanding or following directions. Dr. Heisey indicated that  
26 Plaintiff was "severely limited," defined as "unable to lift at least 2 pounds or unable  
27 to stand and/or walk." (AR at p. 325). As to what treatment he recommended to  
28 improve "employability," he opined "continuous use of meds for seizures." Dr.

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1 Heisey indicated that Plaintiff's learning disability rendered him unable to participate  
2 in pre-employment activities such as job search or employment classes. He opined  
3 that Plaintiff "is permanently disabled" and that "[i]mprovement in unemployability  
4 is unlikely." (AR at p. 326).

5 ALJ Robinson assigned "little weight" to this evaluation for the following  
6 reasons:

7 The only work limits listed involved a learning disability, mild  
8 sleep apnea symptoms, and the usual seizure precautions. This  
9 is inconsistent with a severely limited work level, which states  
10 the person cannot lift at least two pounds and is unable to stand  
11 and/or walk. No objective testing was submitted to validate this  
12 very limited work function. Further, Dr. Heisey opined that the  
13 claimant's regular use of medication would improve his work  
14 ability[,] yet he also stated that the claimant was "permanently"  
15 disabled. This inconsistent statement suggests he has relied  
16 mostly on subjective complaints. In addition, I note that treatment  
17 records, previously discussed, indicate that Dr. Heisey found the  
18 claimant's seizure disorder under "good control" and his sleep  
19 apnea symptoms were well managed. [Citation omitted].

20 (AR at p. 26).

21 In her decision, ALJ Palachuk referred to a May 2010 report in which Dr.  
22 Heisey "opined the [Plaintiff's] seizure disorder was adequately controlled, but not  
23 good enough to consider driving and dangerous-type work." (AR at p. 90). ALJ  
24 Palachuk also referred to a May 2010 Medical Source Statement completed by Dr.  
25 Heisey. In that document, the doctor's "[p]hysical findings included mild left sided  
26 hemiparesis and mild impairment of strength/dexterity of the left hand, related to  
27 cerebrovascular accident at birth." The doctor opined that Plaintiff could stand and/or  
28 walk continuously for 2 hours at a time for a total of 8 hours in an 8-hour day; could  
sit continuously for 4 hours at a time for a total of 8 hours in an 8-hour day; could lift  
and carry 20 pounds frequently and 25 pounds occasionally; could frequently bend,  
squat, or reach, but never climb; was unable to drive, work at heights, or around  
machinery; and had difficulty understanding and following multi-step commands.  
(AR at p. 90).

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1 ALJ Palachuk concluded as follows regarding the record and opinion evidence  
2 before her:

3 As for the opinion evidence, treating physician Dr. Heisey has  
4 been all over the board in his opinion as to whether the claimant  
5 can work or not [citation omitted]. The undersigned does not  
6 give much weight to each of Dr. Heisey's individual opinions  
7 because they vacillated so drastically, that the undersigned  
8 cannot harmonize the various opinions he provided. But  
9 clearly, the record does show that his opinion that the claimant  
10 is unable to work is predicated upon seizure control . . . .  
11 Significant in [this] opinion[] is the claimant's substance use  
and noncompliance with medication. Dr. Heisey reported on  
more than one occasion that if the claimant could get his  
seizure disorder under control[,] then he could pursue activities  
more successfully, including more education. No significant  
findings were noted on Dr. Heisey's . . . physical examinations,  
and Dr. Heisey otherwise opined the claimant was capable of  
lifting/carrying, standing/walking and sitting at the medium  
level of exertion with seizure precautions.

12 (AR at p. 94).

13 Based on the administrative record before her, ALJ Robinson found that since  
14 ALJ Palachuk's prior decision, "there has been little change in the claimant's  
15 condition" and that "[i]f any change has occurred, it is improvement." (AR at p. 25).  
16 The administrative record considered by ALJ Robinson did not include the May 2010  
17 materials from Dr. Heisey, but it did include records from him dating from July 16,  
18 2010 to April 18, 2011, and from October 3, 2011 to December 3, 2012, including  
19 a Medical Source Statement dated December 3, 2012. On July 16, 2010, Dr. Heisey  
20 reported that Plaintiff's "seizures are well-controlled, although he did skip a dose, last  
21 night, of his medication." (AR at p. 332). On August 24, 2010, Dr. Heisey again  
22 reported that Plaintiff's seizure disorder was "well-controlled." (AR at p. 333). On  
23 October 29, 2010, Dr. Heisey reported that Plaintiff arrived without any complaints  
24 and was unsure why he had an appointment. Dr. Heisey indicated that Plaintiff "has  
25 been taking his seizure medicine and has not had any problems." (AR at p. 334). On  
26 December 13, 2010, Dr. Heisey wrote that Plaintiff's "chronic medical problems are  
27 related to an organic brain syndrome" in that Plaintiff "suffered a right middle  
28

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1 cerebral artery infarct early in life” which resulted in “chronic abnormalities . . . of  
2 his brain (right sided encephalomalacia).” Dr. Heisey wrote that Plaintiff’s seizure  
3 disorder, mild left-sided hemiparesis and learning disabilities are related to this right-  
4 sided encephalomalacia. As to Plaintiff’s seizure disorder, Dr. Heisey indicated that  
5 “appears to be under good control;” as to Plaintiff’s mild left hemi-paresis, Dr. Heisey  
6 indicated “[t]his manifests as easier fatigability of the left side of his body” and  
7 “limits his work options;” and as to Plaintiff’s learning abilities, Dr. Heisey indicated  
8 “[t]his limits [Plaintiff’s] training ability for jobs.” (AR at p. 335).

9 On April 18, 2011, Plaintiff reported no seizures to Dr. Heisey. (AR at p. 350).

10 On October 11, 2011, Dr. Heisey wrote a letter to the Washington State  
11 Department of Social and Health Services (DSHS) as follows:

12 Jeffrey Garcia is a 26 year old male with seizure disorder  
13 since birth. He takes medications, which give incomplete  
control of his seizures.

14 He also has learning disabilities and cognitive disabilities.

15 They are both likely related to an abnormal CT scan of the  
16 brain showing encephalomalacia at an early age.

17 These conditions are considered to be lifelong and permanent  
18 disabilities which affect his ability to seek or maintain  
employment.

19 (AR at p. 390).

20 On January 30, 2012, Plaintiff told Dr. Heisey he “may” have had a seizure at  
21 night about a week and a half ago, but he was taking his medication regularly and  
22 “feeling good overall.” (AR at p. 389).

23 On April 20, 2012, Dr. Heisey reported that Plaintiff was “feeling well,” “is  
24 being compliant with his seizure meds” and “denies any seizures since his last visit.”  
25 (AR at p. 381). The same thing was reported by Dr. Heisey on June 1, 2012. (AR at  
26 p. 379).

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1 On August 8, 2012, Dr. Heisey wrote the following after a visit by the Plaintiff:

2 1. Seizure disorder: Sounds to be adequately controlled.  
3 The laboratory value confirms that he is currently taking  
4 his medication as directed. In the past he has been in-  
5 consistent with his compliance, and therefore is not a  
6 good candidate for driving or working around machinery  
7 et cetera. I think this will likely be a lifelong condition  
8 [that] makes it difficult for him to find gainful employment.

9 2. Learning Disability: He has CNS [Central Nervous System]  
10 abnormalities documented as a child, which correspond with  
11 his difficulties in learning. This will be a permanent, lifelong  
12 condition. This also causes a disability and limits his  
13 employability.

14 (AR at p. 377).

15 On December 3, 2012, Dr. Heisey noted that Plaintiff's "carbamazepine level  
16 several months ago was slightly above the therapeutic range, but he denies any  
17 seizure since that time, and no symptoms of toxicity." Examination showed he was  
18 "in no apparent distress" and "gait, tandem gait, and Romberg examination [were]  
19 normal." (AR at p. 370). The doctor completed a Medical Source Statement on the  
20 same date. Of note, he answered "no" to the question of whether Plaintiff's grip and  
21 manual dexterity are limited, and "yes" to the question of whether Plaintiff could  
22 manipulate his hands and arms in repetitive actions. (AR at p. 395). The doctor  
23 indicated that Plaintiff could stand and/or walk and sit, with usual breaks, for 8 hours  
24 in an 8-hour work day. And although Plaintiff could never climb, he could frequently  
25 bend, squat and reach. Dr. Heisey reiterated that seizure potential prohibited Plaintiff  
26 from working "at heights or around machinery." (AR at p. 396).

27 Based on its thorough review of the medical records from Dr. Heisey, the court  
28 concludes ALJ Robinson offered specific and legitimate reasons for rejecting the  
doctor's opinion that Plaintiff is "permanently disabled" and "improvement in [his]  
unemployability was unlikely" as stated in the February 5, 2010 evaluation. This  
evaluation itself indicates Plaintiff's seizures are controlled when he takes his  
medication as prescribed. And this is confirmed by many of Dr. Heisey's reports

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pre-dating and post-dating this particular evaluation. When Dr. Heisey indicated in the February 5, 2010 evaluation that Plaintiff was “severely limited,” it is apparent he was thinking in terms of Plaintiff’s abilities to hear<sup>2</sup>, communicate and understand or follow directions, all of which are non-exertional limitations. He was not thinking in terms of exertional limitations because obviously he opined on numerous occasions, and most recently on December 3, 2012, that Plaintiff could lift significantly more than 2 pounds and was capable of standing and/or walking. Indeed, there is nothing in Dr. Heisey’s reports manifestly contrary to the ALJ’s conclusion that Plaintiff can lift and carry 25 pounds occasionally and 10 pounds frequently; that he can stand or walk six hours and sit six hours in a workday; that he can occasionally climb ramps and stairs; that he can never climb ladders, ropes and scaffolds; that he can occasionally balance; and that he can frequently stoop, kneel, crouch and crawl. Consistent with Dr. Heisey’s reports, ALJ Robinson found the Plaintiff cannot drive, due to potential seizures, and must avoid exposure to workplace hazards such as dangerous machinery and unprotected heights. ALJ Robinson found the Plaintiff has unlimited reaching and handling with the right, upper extremity, and with the left upper extremity, he can assist in lifting and handling, but only occasionally grip. As noted above, in his most recent evaluation dated December 3, 2012, Dr. Heisey indicated there were no problems with Plaintiff’s grip and manual dexterity, although in May 2010, the doctor’s “[p]hysical findings included mild left sided hemiparesis and mild impairment of strength/dexterity of the left hand, related to cerebrovascular accident at birth.”<sup>3</sup>

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<sup>2</sup> There is nothing in the record indicating Plaintiff has difficulty with hearing.

<sup>3</sup> It may be that non-examining physician, Elizabeth St. Louis, M.D., noted this in her review of ALJ Palachuk’s decision. (AR at pp. 125-28).



1 The question then becomes whether there is substantial evidence supporting  
2 ALJ Robinson's finding that Plaintiff has "sufficient attention and concentration to  
3 perform relatively simple, non-complex tasks" and whether she failed to consider any  
4 other pertinent mental limitations. This is where Plaintiff's learning disability comes  
5 into play as discussed below regarding the opinions of Dr. Genthe.

## 6 7 **2. Thomas Genthe, Ph.D.**

8 Plaintiff saw Dr. Genthe on May 19, 2011 for a psychological evaluation. Dr.  
9 Genthe diagnosed Plaintiff with "Depressive Disorder, NOS<sup>4</sup> (managed with  
10 medication)," "(by history) Learning Disorder NOS," and "(by history) Cognitive  
11 Disorder, NOS." (AR at p. 355). On the Global Assessment of Functioning (GAF)  
12 scale, he assigned the Plaintiff a score of "75-80 (psychologically)" and "60  
13 (cognitively)." A score between 71-80 indicates that "[i]f symptoms are present, they  
14 are transient and expectable reactions to psychosocial stressors" and "no more than  
15 slight impairment in social, occupational or school functioning." A score between  
16 51-60 indicates "moderate symptoms" or "moderate difficulty in social, occupational,  
17 or school functioning."<sup>5</sup> According to Dr. Genthe:

18 [Plaintiff's] ability to understand and remember short, simple  
19 instructions was assessed as fair. His ability to understand  
20 and remember detailed instructions was assessed as fair to  
21 poor. His ability to carry out short, simple instructions was  
22 assessed as fair. His ability to carry out detailed instructions  
23 was assessed as fair to poor. His ability to sustain an ordinary  
24 routine without supervision was assessed fair. His ability to  
25 work with or near others without being distracted by them  
26 was assessed as fair. His ability to respond appropriately  
27 to changes in the work setting was assessed fair to poor.

28 From a social perspective, his ability to interact appropriately

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25 <sup>4</sup> "Not Otherwise Specified."

26 <sup>5</sup> Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> Ed. (DSM-IV-  
27 TR)(2000), p. 34.

1 with the public was assessed as fair, and his ability to respond  
2 appropriately to criticism from supervisors as fair.

3 (AR at p. 355).

4 ALJ Robinson assigned “some weight” to the assessment of Dr. Genthe,  
5 explaining this as follows:

6 Dr. Genthe conducted a mental status examination that  
7 consisted of check off boxes without any narrative information  
8 supporting the limitations listed. Further, the mental status  
9 examination was unremarkable, with few objective deficits.  
10 Most of the assessment was based on the claimant’s self-  
11 reporting of his symptoms. . . . However, the finding that  
12 claimant could perform simple and repetitive tasks, his  
13 depression was intermittent, and that his depression symptoms  
14 were managed with medication is consistent with the record,  
15 thus weighed heavily.

16 (AR at p. 27).

17 In his report, Dr. Genthe noted that he did not conduct a formal cognitive  
18 assessment or achievement testing and that his diagnoses of cognitive disorder, NOS,  
19 and learning disorder, NOS, were given “[b]ased on the information available.” Dr.  
20 Genthe further noted that based on previous testing, the Plaintiff has “impaired  
21 intellectual abilities” and for” specifics,” he deferred to ALJ Palachuk’s prior  
22 decision. (AR at p. 355). ALJ Palachuk’s decision discussed such testing which had  
23 been conducted by Jay Toews, Ed.D. (AR at p. 81 and p. 87), and Roland Dougherty,  
24 Ph.D., (AR at p. 88). Other mental health records were part of the record before ALJ  
25 Palachuk (AR at pp. 89-90), and a psychological expert, Margaret R. Moore, Ph.D.,  
26 testified at the hearing before ALJ Palachuk. (AR at pp. 90-91).

27 Plaintiff contends the ALJ disregarded Dr. Genthe’s findings regarding  
28 Plaintiff’s “cognitive, learning, memory, difficulty focusing and other intellectual  
problems and difficulties performing even simple tasks.” It is apparent, however, that  
Dr. Genthe deferred to the previous findings of other psychologists, while noting that  
Plaintiff “endorsed the following cognitive difficulties: paying attention,  
concentrating, being easily distracted, forgetfulness, remembering how to perform

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1 tasks in a timely manner, organizing tasks, performing multiple-step tasks, multi-  
2 tasking.” (AR at p. 352). ALJ Palachuk found Plaintiff’s testimony about the extent  
3 of his mental limitations was not credible:

4           The claimant testified at the hearing that the biggest thing  
5 preventing him from working is that he’s not as fast as  
6 people would like him to be. However, although a slow  
7 pace has been noted and discussed in Dr. Moore’s testimony,  
8 nothing in the longitudinal record suggests he is not capable  
9 of performing simple, repetitive work. His intellectual  
10 functioning appears to be generally in the low average range,  
11 as indicated on testing . . . . The claimant testified that he  
12 needs a lot of prompting and reminding to get things done,  
13 however, attention and concentration were noted to be  
14 quite high during the psychological evaluation with Dr.  
15 Toews . . . and memory testing scores . . . were in the  
16 average range and did not reflect any significant memory  
17 difficulties. The claimant testified that he doesn’t do much  
18 in a typical day, however this does not appear to be as a  
19 result of significant impairment as he earlier told Dr. Toews  
20 . . . that he is able to perform any number of activities of  
21 daily living without problems, and he told Dr. Dougherty  
22 . . . that the only reason he limited his activities was that  
23 his family was afraid he would have a seizure.

24 (AR at p. 93).

25           As discussed below, this court finds ALJ Robinson provided clear and  
26 convincing reasons for discounting Plaintiff’s credibility to the extent he professes  
27 to have limitations greater than those which are confirmed by the medical record  
28 before ALJ Palachuk and ALJ Robinson.

          To the extent Dr. Genthe offered an opinion about Plaintiff’s cognitive  
abilities, ALJ Robinson provided specific and legitimate reasons for discounting that  
opinion, one of those being that the opinion was based on Plaintiff’s self-reporting-  
his “endorsement”- of certain symptoms.

## 24 **NON-EXAMINING PHYSICIANS**

25           The opinion of a non-examining physician cannot by itself constitute  
26 substantial evidence that justifies the rejection of the opinion of either an examining  
27 or a treating physician. *Lester*, 81 F.3d at 832. Plaintiff contends that ALJ Robinson,

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1 in giving “significant weight” to the opinions of State agency reviewing mental health  
2 experts, improperly relied “wholly” upon their opinions in assessing Plaintiff’s  
3 psychological impairments and resulting limitations.

4 In her decision, ALJ Robinson cited evaluations from Edward Beaty, Ph.D.,  
5 and Lisa Hacker, M.D., (AR at p. 27), to support her conclusion regarding Plaintiff’s  
6 mental RFC: that Plaintiff has sufficient attention and concentration to perform  
7 relatively simple, non-complex tasks. Dr. Hacker, in particular, supported her  
8 assessment of Plaintiff’s mental RFC by citing to the 2008 testing performed by Dr.  
9 Toews which “found average IQ, intact memory, and mild limits in attention and  
10 concentration” and “[c]urrent mood [symptoms] are not so severe as to significantly  
11 impact cognitive functioning.” (AR at p. 87 and p. 130).

12 ALJ Robinson gave “significant weight” to the State assessments “because they  
13 were based on a review of the record, the evidence supports their findings and the  
14 assessors are familiar with the Social Security Administration regulations.” (AR at  
15 p. 27). The ALJ did not rely solely on the opinions of the non-examining physicians,  
16 but relied also on the evidence of record which supports the findings of those  
17 physicians. Opinions of a non-examining physician may serve as substantial  
18 evidence when they are supported by other evidence in the record and are consistent  
19 with it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995). With regard to  
20 cognitive limitations, as discussed above, Dr. Genthe deferred to the findings of the  
21 psychologists who had previously conducted intelligence testing on the Plaintiff. Dr.  
22 Hacker cited this very testing in reaching her conclusions about Plaintiff’s mental  
23 RFC. And as discussed below, the ALJ provided clear and convincing reasons for  
24 discounting Plaintiff’s credibility regarding cognitive limitations.

## 25 26 **CREDIBILITY**

27 Where, as here, the Plaintiff has produced objective medical evidence of an  
28

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1 underlying impairment that could reasonably give rise to some degree of the  
2 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ's  
3 reasons for rejecting the Plaintiff's testimony must be clear and convincing. *Garrison*  
4 *v. Colvin*, 759 F.3d 95, 1014 (9<sup>th</sup> Cir. 2014); *Burrell v. Colvin*, 775 F.3d 1133, 1137  
5 (9<sup>th</sup> Cir. 2014).

6 Plaintiff asserts "the objective medical evidence and opinions of treating and  
7 examining providers is consistent with [his] allegations." For reasons discussed  
8 above, closer scrutiny of Dr. Heisey's reports and Dr. Genthe's evaluation indicates  
9 they do not support Plaintiff's assertion that he is physically and mentally incapable  
10 of doing any type of substantial gainful activity. The record indicates Plaintiff's  
11 seizures can be adequately controlled with medication, as noted by the ALJ in her  
12 decision. (AR at p. 24). Furthermore, as noted by the ALJ (AR at pp. 24-25), the  
13 record reveals Plaintiff engaging in a variety of activities that are compatible with the  
14 RFC determined by the ALJ and incompatible with an inability to perform substantial  
15 gainful activity of any sort. These are "clear and convincing" reasons for finding that  
16 Plaintiff's statements concerning the intensity, persistence and limiting effects of his  
17 alleged symptoms are not "entirely credible." (AR at p. 24).<sup>6</sup>

18  
19  
20 <sup>6</sup> The ALJ did not cite Plaintiff allegedly working in 2009 as a reason for  
21 discounting Plaintiff's credibility. Instead, the ALJ cited that as a reason for  
22 giving less weight to Dr. Genthe's assessment. (AR at p. 27). As Plaintiff points  
23 out, the record does not support the Plaintiff having worked in 2009 and indeed,  
24 establishes that he has no past relevant work and has never engaged in substantial  
25 gainful activity. And although the ALJ pointed out what Dr. Genthe reported  
26 regarding Plaintiff's response as to why he had not been employed since his last  
27 job ended (AR at p. 26), the ALJ also did not cite that as part of her credibility  
28 analysis.

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**CONCLUSION**

ALJ Robinson rationally interpreted the evidence and “substantial evidence”- more than a scintilla, less than a preponderance- supports her decision that Plaintiff is not disabled.

Defendant’s Motion For Summary Judgment (ECF No. 18) is **GRANTED** and Plaintiff’s Motion For Summary Judgment (ECF No. 14) is **DENIED**. The Commissioner's decision is **AFFIRMED**.

**IT IS SO ORDERED.** The District Executive shall enter judgment accordingly and forward copies of the judgment and this order to counsel of record.

**DATED** this 15th day of December, 2016.

*s/Lonny R. Suko*

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LONNY R. SUKO  
Senior United States District Judge